Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-477

In The

Supreme Court of the United States

October Term, 1988

JOE MONASTERO; SAM KATZMAN; and MARLENE "MARDY" McCULLOUGH,

Appellants,

vs.

STATE OF NEBRASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS

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The State of Nebraska has filed a Motion to Dismiss the appeal in this case arguing that the case does not involve a final judgment pursuant to 28 U.S.C. § 1257(2). Appellants in their jurisdictional statement argue that the decision of the Nebraska Supreme Court upholding the validity of Neb. Rev. Stat. § 32-713 in the face of a constitutional challenge was a final judgment within the meaning of 28 U.S.C. § 1257(2). Appellants believe this to be a final judgment because the constitutional issue was the primary, if not the sole defense available to these Appellants and for the more compelling reason that the most important constitutional right available to American citizens, the right to core political speech, would go unprotected during any further proceedings, which would undoubtedly consume a substantial period of time and exhaust the emotional and financial resources of the Appellants.

The State argues that a judgment cannot be final when anything further remains to be determined. In *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 124 (1945), this court held that the finality rule had not been administered in such a mechanical fashion, and observed that in some instances immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and delayed justice," Id. at 124.

In cases involving first amendment rights, especially when core political speech is involved, the reasons asserted for mechanical adherence to the finality rule pale in comparison with the danger of denying justice by delay. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 n.7 citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148. In *Gillespie*, this court held that the requirement of finality is

to be given a "practical rather than technical construction" and suggested a balancing test of the most important competing considerations, which are "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-153.

These Appellants have asserted that they come within both the first and the fourth category of cases set out in *Cox*, in which this Court has treated the decision on the Federal issue as final for the purposes of 28 U.S.C. § 1257 in spite of the fact that there remained further proceedings in the State Court. The first such category of cases include those in which the Federal issue would not be mooted or otherwise affected by the further proceedings because those proceedings would have little substance and their outcome would be certain. *Mills v. Alabama*, 384 U.S. 214 (1966). The State argues that these Appellants do not fit within this category of cases established by the *Cox* analysis because the outcome of the State District Court proceedings is not preordained since there has not been a conviction or a sentence. These Appellants hold out virtually no hope that they can avoid ultimate conviction, now that their constitutional issue has been decided against them. To require these Appellants to go through the process of a trial, conviction, sentencing, appeal to the Nebraska Supreme Court and then ultimately an appeal to this Court would result in an inexcusable delay and a completely unnecessary waste of time and energy in a judicial system already burdened by delay. It would exhaust the emotional and financial resources of these Appellants and may very well result in their economic inability to bring this issue before this

Court at a later time. As a practical matter, a refusal to hear the appeal at this time may doom these Appellants to accept the Nebraska Supreme Court decision on their constitutional rights as final even though that decision may be in error.

It is interesting to note, as this Court did in *Cox*, that in the concurring opinion in *Mills v. Alabama*, Mr. Justice Douglas joined by Mr. Justice Brennan "stated that even if the Appellant had a defense and might prevail at trial, jurisdiction was properly noted in order to foreclose unwarranted restrictions on the press should the State Court's constitutional judgment prove to be in error." *Cox* supra at 485 n.12.

The State concedes that this case comes within all of the elements of the fourth category of cases set forth in *Cox* with the exception of the final element: that the unreviewed decision of the Nebraska Supreme Court might seriously erode Federal policy. On this point the State is clearly wrong. As its only argument, the State concludes that free speech has not been restricted by the statutes in question because other initiative drives have succeeded.

But the success or failure of petition drives which may have been mounted by the few individuals whose bravery overcame the manifest threat of the sanctions of the Nebraska statutory scheme does not diminish the chill which that scheme casts over the process of core political speech. As Justice Brennan said in *Federal Election Commission v. Massachusetts Citizen for Life, Inc.*, 479 U.S. 238 (1986):

> Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom" *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

There can be no more basic, no more seminal, no more crucial Federal policy than the protection, at the earliest possible stage of the right of its citizens to express their views on the laws which govern them. And there can be no more compelling cry for the enforcement of that policy than the appeal of one whose voice has been stilled by the mechanical application of laws which not only practically operate, but were designed at their conception, to quiet the sound of dissent. A delay in review under the First Amendment in this case is simply the death knell of free, unrestricted expression of political ideas through petition in this State; a process which this court has described as entitled to First Amendment protection at its zenith. *Meyers v. Grant*, ___ U.S. ___, ___, 108 S.Ct. 1886 (1988).

Therefore, these Appellants respectfully request that this Court note probable jurisdiction.

Respectfully submitted,

JOE MONASTERO, SAM KATZMAN AND MARLENE MCCULLOUGH,
Appellants

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